(5)

No. 85-5915

In the Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA E. WRIGHT, ET AL., PETITIONERS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 25, 1985
CERTIORARI GRANTED JANUARY 21, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-908

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated, PLAINTIFFS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, DEFENDANT

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

Plaintiffs are public housing tenants living in projects owned and operated by the City of Roanoke Redevelopment and Housing Authority. Federal law limits the portion of tenant incomes which can be charged as rent and subsidizes housing authority operations to make the subsidy possible. For the limited rent, public housing agencies are required to furnish a reasonable allowance of electrical utility service as well as the dwelling unit. For electrical consumption in excess of their allowances, tenants are required to pay quarterly surcharges.

The plaintiffs claim that the Housing Authority has set the utility allowance unreasonably low, and failed to revise them, so that the Authority may collect greater excess consumption surcharges from the majority of tenants. They claim that the Housing Authority has dis-

regarded federal law describing how such allowances are to be maintained. They also claim that the allowances are in violation of their leases with the authority. For themselves and other public housing tenants, the plaintiffs ask that the Housing Authority be ordered to comply with the law and its own leases and refund to tenants the charges illegally imposed in the past.

JURISDICTION

1. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) and (4) for redress under 42 U.S.C. § 1983 of a deprivation of rights, privileges, or immunities secured by the constitution and laws of the United States; and under 28 U.S.C. § 1337 for claims arising out of interstate commerce. The court also has pendent jurisdiction over any state law aspects of the questions here presented.

PARTIES

2. Plaintiffs Brenda E. Wright, Geraldine H. Broughman and Sylvia P. Carter all live with their families in public housing projects owned by defendant Authority in the city of Roanoke.

3. Defendant City of Roanoke Redevelopment and Housing Authority ("the Authority") is a political subdivision of the Commonwealth of Virginia created under Code of Virginia (1950), § 36-4. It is a public housing agency as defined at 42 U.S.C. § 1437(a)(6). The Authority administers public housing in the City of Roanoke, Virginia.

4. Defendant Authority was at all relevant times operating under color of state law.

CLASS

5. The named plaintiffs bring the action on their own behalf and, pursuant to Rule 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The class is comprised of all persons who have been or will be surcharged

for consumption of electric utility service in excess of allowances established by the defendant Authority.

6. The requirements of Rule 23 are met in that

(a) the class is so numerous that joinder of all members is impracticable. The exact number of persons in the class is not presently known to plaintiff, but can be adduced through discovery. The class will be drawn from most families now or formerly residing in approximately 1103 units of public housing in 7 projects in the City of Roanoke.

(b) The common issue of fact with regard to the class is whether defendant Authority has properly calculated and maintained a schedule of utility allowances. The issue of law common to the class is the adequacy of defendant Authority's practice in light of federal law and in the light of the provisions of a lease form used throughout the Authority regarding utility allowances.

(c) The claims of the representative parties are typical of the claims of the class; the named plaintiffs' interests are not antagonistic to the claims of other members, but in fact, their action if successful will protect the rights and interests of other members of the class.

(d) The representative parties will fairly and adequately protect the interest of the class.

(e) Defendant Authority has by its policy and practice acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

(f) Common questions of law and fact as to the legality of the Authority's utility policy predominate over questions of computation of claims affecting individual members, which can be easily determined by reference to Authority records of individual tenant consumption. A class action is the superior and the only available method for the fair and efficient adjudication of the controversy.

STATUTORY AND REGULATORY SCHEME

7. The public housing projects owned by defendant Authority were built and are operated with federal

subsidy under the National Housing Act of 1937 as part of the national effort to assure the poor a supply of decent, safe, and sanitary housing.

8. Because of the limited ability of low-income families to pay fair market rentals while meeting their other essential needs, the Congress by the "Brooke Amendment" restricted the portion of rent which could be charged such families by public housing agencies ("PHAs") to 25% of their adjusted income, 42 U.S.C. § 1437(a)(1).

9. The Secretary of the United States Department of Housing and Urban Development ("the Secretary"), in exercise of his authority to interpret and implement the law, has at 24 C.F.R. § 860.403(a) and (i) defined rent for Brooke Amendment purposes to include charges for use of the dwelling accommodation and equipment, services, and "reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project." Charges for utility consumption in excess of the PHA allowance are not included, and therefore not subject to the Brooke Amendment limits implemented by 24 C.F.R. § 860.405.

10. The establishment of utility allowances by defendant Authority and other PHAs is governed by the Secretary's regulations at 24 C.F.R. § 865.470 *et seq.*, promulgated September 9, 1980.

11. Those regulations required all PHAs to establish allowances for PHA furnished utilities and to include with their rent schedules the allowances and a statement of items of major equipment whose utility consumption requirements were included in determining the amounts of the allowances. 24 C.F.R. § 865.473.

12. The allowances for PHA furnished utilities were also required to be calculated to be sufficient to meet the needs of 90% of the units in each category of dwelling unit and size. This calculation was to be based on past consumption records. 24 C.F.R. § 865.477.

13. Thereafter, the PHA was to review the number and percentage of tenants during each billing period who

were subject to surcharge for exceeding the allowances. When the percentage of surcharged tenants exceeded 25% of a category, the PHA was to review and revise the allowances as appropriate. 24 C.F.R. § 865.480.

COMMON FACTS

14. Plaintiffs and all tenants in the Authority's housing projects (except for purchase and elderly projects) have entered the same form of lease upon a form required by the Authority for the last several years.

15. Paragraph 4 of the Authority's standard lease provides:

> Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and *electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [emphasis added]

16. Neither the standard lease nor the schedules maintained by the Authority define or limit "general household appliances" for which the Authority obligates itself to furnish electricity as reasonably necessary.

17. Following promulgation of 24 C.F.R. § 865.470 *et seq.*, defendant Authority did not revise tenant utility allowances in accordance with the regulations but continued to rely upon an earlier schedule of allowances dating back to April 1, 1977.

18. Defendant Authority did not include with its rent schedules made available to tenants or submitted to HUD a statement of items of major equipment whose utility

consumption requirements were included in determining the amounts of the allowances.

19. Defendant Authority did not attempt to calculate PHA-furnished utilities in amounts reasonably necessary for lighting and general household appliances and heat at appropriate times of year, and also range and refrigerator.

20. Defendant Authority did not attempt to calculate PHA furnished utilities so that the resulting allowances would be sufficient to meet the needs of 90% of the units in each category of dwelling unit and size.

21. Defendant Authority did not review the number and percentage of tenants surcharged during each billing period to determine if they exceeded 25% of a category and did not consider adjustments of the allowances upon that information.

22. Defendant Authority did not re-establish the utility allowances for its tenants until April 1, 1982, and at that time did so in disregard of the requirements of 24 C.F.R. § 865.470 *et seq.*

23. As a result of this practice defendant Authority has regularly collected and continues to collect utility surcharges not from a limited number of excess consumers, but rather from the majority of its tenants.

24. As a result of this practice defendant Authority collected and continues to collect in excess of $50,000 annually of unauthorized surcharges.

INDIVIDUAL FACTS

25. Plaintiff Brenda E. Wright and her 2 children have lived in the Authority's Lansdowne Park project for 11 years. She pays rent of $169 per month from her earnings of approximately $128 per week as a dietary aide at Community Hospital.

26. Ms. Wright was surcharged $33.53 in October 1982 by the Authority for excess utility consumption. This and previous charges imposed a serious strain upon her limited resources.

27. Plaintiff Geraldine Broughman has lived with her 5 minor children in the Authority's Lansdowne Park for over four years. She pays the Authority monthly rental of $89 from her public assistance. She is in a work training program which she hopes will qualify her for a good job.

28. For every quarter she can remember, Mrs. Broughman has been surcharged by the Authority for excess utility consumption. She is not aware of any of her neighbors in the project who have escaped similar surcharges.

29. For the first three quarters of 1982, Ms. Broughman was surcharged $44.82, $62.15 and over $69 respectively for excess utility consumption. These charges impose a serious strain upon her limited resources and she must often pay them over a period of several months rather than immediately when billed.

30. Plaintiff Sylvia P. Carter and her 2 children moved into the Authority's project known as Jamestown Place in February 1982. She pays rent of $48.00 from her income of $255 per month in public assistance.

31. Mrs. Carter was surcharged $44.28 in October 1982 by the Authority for excess utility consumption. This and previous similar charges impose a serious strain upon her limited resources.

32. If the schedule of utility allowances provided by the Authority had indeed furnished electricity for "general household appliances" in accordance with their leases, the named plaintiffs would have paid less surcharge or none at all.

33. If the schedule of utility allowances provided by the Authority had been revised in accordance with the requirements of federal regulation, the named plaintiffs would have paid less surcharge or none at all.

FIRST CLAIM

34. The practice of defendant Authority in using an outdated schedule of utility allowances and failing to

revise and maintain the schedule in accordance with 24 C.F.R. § 865.470 *et seq.* violates those regulations.

35. Defendant Authority's practice of surcharging tenants for utility service which should have been included in their rent also constitutes violation of the Brooke Amendment limits of 42 U.S.C. § 1437a(1).

36. Defendant Authority's practice thereby has deprived and continues to deprive plaintiffs and the class they represent of benefits bestowed by federal law and regulation.

SECOND CLAIM

37. Defendant Authority's failure to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no charge to tenants violates its obligation to plaintiffs and their class of tenant families under Paragraph 4 of its standard lease.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this court:

(a) certify this action to proceed as a class action under Rule 23;

(b) declare the challenged practice of defendant Authority to be in violation of the Brooke Amendment, federal regulations, and the Authority's own tenant leases;

(c) require defendant Authority to recalculate the schedule of utility allowances in accordance with 24 C.F.R. § 865.470 *et seq.* so that not more than 10% of tenant families of each category and unit size will be surcharged for excess utility consumption in any quarter and so that electrical service reasonably necessary for general household appliances will be provided without surcharge;

(d) require defendant Authority to refund to plaintiffs and members of their class all surcharges previously collected;

(e) award plaintiffs their costs and attorney fees pursuant to 42 U.S.C. § 1988, to be paid to the Legal Aid Society of Roanoke Valley for application in its program of indigent representation.

BRENDA E. WRIGHT
GERALDINE H. BROUGHMAN
SYLVIA P. CARTER
By Counsel

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by /s/ Henry L. Woodward
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

[Title Omitted in Printing]

ANSWER

Comes now the defendant, City of Roanoke Redevelopment and Housing Authority, by counsel, and for its Answer to plaintiffs' Complaint, states as follows:

(1) The preliminary statement requires no answer and, accordingly, defendant relies on its answer more specifically set out herein.

FIRST DEFENSE

(2) Defendant admits jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) but denies all other allegations contained in paragraph (1) of the complaint.

(3) The allegations contained in paragraphs (2), (3), and (4) are admitted.

(4) Defendant denies that this action should be certified as a class action and defendant denies each and every allegation contained in paragraphs (5) and (6) of the complaint.

(5) Defendant denies the allegations contained in paragraph (7) and (8) of the complaint.

(6) Defendant admits the express statutory language contained in paragraphs (9), (10), (11), (12), and (13) of the complaint but denies the conclusions of law required by the allegations contained therein and avers that these regulations are subject to interpretation and enforcement by the Secretary of Housing and Urban Development.

(7) Defendant admits the allegations contained in paragraphs (14) and (15) of the complaint.

(8) Defendant denies the allegations contained in paragraph (16) of the complaint except to the extent that the lease speaks for itself.

(9) The allegations contained in paragraphs (17), (18), (19), and (20) are denied.

(10) Defendant admits the allegations contained in paragraph (21) of the complaint.

(11) Defendant admits that it did not re-establish the utility allowances for its tenants until April 1, 1982, but denies the remaining allegations contained in paragraph (22) of the complaint.

(12) Defendant denies the allegations contained in paragraphs (23) and (24) of the complaint.

(13) Defendant admits that plaintiff Brenda E. Wright has lived in the Authority's Lansdowne Park project for 11 years and that she pays a rent of $169.00 per month, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (25) of the complaint.

(14) Defendant admits that Mrs. Wright was surcharged $33.53 in October, 1982, by the Housing Authority for excess utility consumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (26) of the complaint.

(15) Defendant admits that plaintiff Geraldine H. Broughman has lived in the Authority's Lansdowne Park project for over 4 years and that she previously paid the Authority a monthly rental of $89.00, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (27) of the complaint.

(16) Defendant is without sufficient information to admit or deny the allegations contained in paragraph (28) of the complaint.

(17) Defendant admits that for the first three quarters of 1982, Ms. Broughman was surcharged $44.82, $62.15 and over $69 respectively for excess utility con-

sumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (29) of the complaint.

(18) Defendant admits that plaintiff Sylvia P. Carter moved into the Authority's project known as Jamestown Place in February, 1982, and that she pays rent of $48.00, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (30) of the complaint.

(19) Defendant admits that Mrs. Carter was surcharged $44.28 in October, 1982, by the Housing Authority for excess utility consumption, but defendant is without sufficient information to admit or deny the remaining allegations contained in paragraph (31) of the complaint.

(20) Defendant denies the allegations contained in paragraphs (32), (33), (34), (35), (36), and (37) of the complaint.

(21) Defendant denies all allegations in the complaint not expressly admitted herein.

SECOND DEFENSE

(22) Defendant has entered into a lease with each tenant identified as part of the alleged class, which lease defines the rights of the parties respecting the furnishing of utilities and charges therefor. The alleged class members' rights are circumscribed by said lease, and alleged class members have waived and are stopped from asserting any claims inconsistent therewith.

Respectfully,

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

By /s/ Thomas T. Lawson
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[Title Omitted in Printing]

MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) and (h)(2) of the Federal Rules of Civil Procedure, defendant City of Roanoke Redevelopment and Housing Authority (hereafter the Authority) moves for judgment on the pleadings in its favor and for its Motion states:

(1) The Complaint fails to state a cause of action under the National Housing Act of 1937, 42 U.S.C. § 1437, as no private right of action exists under that statute and enforcement depends solely on the action of HUD.

(2) The Complaint fails to state a cause of action pursuant to 42 U.S.C. § 1983 in that plaintiffs do not allege a deprivation of a Constitutional right or a right granted plaintiffs by the Housing Act of 1937.

(3) The Complaint fails to join an indispensable party within the meaning of Rule 19 in that the Department of Housing and Urban Development (HUD) is not named as a party despite the exclusive control of the regulatory enforcement scheme by that agency.

WHEREFORE, for the above reasons the defendant Authority moves the court to grant judgment in favor of the defendant and to dismiss the complaint and to grant defendant its costs and such other relief as the Court may deem proper.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY

By /s/ B.E. Harris
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-908

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedures, plaintiffs move for partial summary judgment in favor of them and the plaintiff class as to the first claim of the complaint, specifically the liability of defendant City of Roanoke Redevelopment and Housing Authority for violation of the Brooke Amendment and regulations thereunder at 24 C.F.R. § 865.470 *et seq.*

As grounds of this motion plaintiffs will show that there exists no genuine issue as to any material fact relevant to this claim, and the plaintiffs and their class are entitled to judgment as a matter of law.

BRENDA E. WRIGHT *et al.*
By Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

BRENDA E. WRIGHT, ET AL., PLAINTIFFS

vs.

CITY OF ROANOKE REDEVELOPMENT AND
HOUSING AUTHORITY, DEFENDANT

MEMORANDUM OPINION

By: James C. Turk, Chief District Judge

On December 8, 1982, Plaintiffs, who are tenants of public low-cost housing, filed suit in this court against their landlord, the City of Roanoke Redevelopment and Housing Authority[1] ("RRHA"). In their complaint, Plaintiffs alleged that RRHA violated the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a) (1983), and its implementing regulations, 24 C.F.R. §§ 865.470-.482 (1983), in that it had set the utility allowances unreasonably low and failed to revise them, so that RRHA might collect greater excess consumption surcharges from the majority of tenants. They also claimed that RRHA had disregarded federal law prescribing how such allowances are to be maintained. The Brooke Amendment provides that public housing tenants be charged no more than twenty-five to thirty percent of

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[1] On August 10, 1983, this action was certified as a class action, the class being comprised of tenant families in seven projects of public housing in the City of Roanoke.

their adjusted income for rent, which by definition includes an established amount of utilities.[2] Plaintiffs based their claims for relief upon 42 U.S.C. § 1983 and the lease contracts between Plaintiffs and Defendant RRHA.

On May 14, 1984, Defendant RRHA moved for judgment on the pleadings, pursuant to Rules 12(c) and (h)(2) of the Federal Rules of Civil Procedure. In its motion, RRHA challenges the legal sufficiency of plaintiffs' cause of action. RRHA asserts that: 1) the plaintiffs have no private right of action under the Brooke Amendment and that enforcement depends solely on the action of the United States Department of Housing and Urban Development ("HUD"), 2) the Housing Act does not create any substantive rights which would allow the plaintiffs to proceed under § 1983, and 3) HUD is an indispensable party to the action and the plaintiffs' failure to join it mandates dismissal. Since matters outside the pleadings have been submitted to and considered by this court, the defendant's motion shall be treated as one for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(c), 56.

I.

INTRODUCTION

In *Home Health Services, Inc. v. Currie*, 706 F.2d 497 (4th Cir. 1983), a provider of home health services brought suit against a physician and the state medical university for alleged violations of the Medicare Act, 42

[2] Gross rent is the amount of rent chargeable to a tenant for the use of the dwelling accommodation, equipment, . . . services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities . . . . 24 C.F.R. § 865.472. Allowances for Public Housing Authority ("PHA")-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. 24 C.F.R. § 470.

U.S.C. § 1395a (1983), and federal civil rights statutes. The Fourth Circuit Court of Appeals found that Home Health had no implied right of action under the Medicare Act, and went on to state that "the conclusion that Home Health has no right of action . . . under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." *Home Health*, 706 F.2d at 498.[3] Thus this court feels that under the Fourth Circuit's analysis, a determination of whether the plaintiffs have been deprived of "rights, privileges, or immunities" within the meaning of § 1983 [4] should begin with a determination of whether an implied right of action exists under the Brooke Amendment.

II.

PRIVATE RIGHT OF ACTION UNDER THE BROOKE AMENDMENT

In determining whether a private right of action may be implied from a statute when legislation does not provide expressly for such a remedy, a court must focus on congressional intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982). Since 1975, the prevailing standard for determining whether Congress intended to imply such a right of action is that set forth in *Cort v. Ash*:

[3] The Fourth Circuit cited *Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1217-18 (4th Cir. 1981) as standing for this conclusion.

[4] 42 U.S.C. § 1983 provides, in relevant part, that:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

422 U.S. 66, 78 (1975) (citations omitted). Although later cases favored a somewhat different but related approach, *see, e.g., Transamerica Mortgage Advisor, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979), the Supreme Court has recently reaffirmed the use of the *Cort* analysis. *Daily Income, Inc. v. Fox*, 104 S.Ct. 831, 839 (1984).

The first inquiry under *Cort* is whether Congress intended to create a special class of beneficiaries which includes the plaintiffs, and, if so, whether Congress intended to confer federal rights upon such beneficiaries. In construing sections 1437(c) and 1441, two general policy sections of the Housing Act, the Fourth Circuit Court of Appeals determined that: "First, the purpose of the legislation was to help the states; second, the purpose in helping the states was ultimately to benefit low income families. Thus the legislation had two beneficiaries—states as direct beneficiaries and low-income families as indirect beneficiaries." *Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981). The *Perry* court also found that "[t]here is clearly no indication in the legislation or in [the] history [of the Housing Act] that Congress intended to

create in public housing tenants a federal right of action against their municipal landlords." *Id.*

The court, combining factors three and four of the *Cort* analysis, determined that:

> it would plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the legal right involved is one traditionally left to state law. It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement than in the legal area of landlord-tenant.

Id. at 1216. Thus, the court held that there was no implied cause of action under the Housing Act against a local housing authority.

In applying the *Cort* analysis to the provisions of the Brooke Amendment, this court sees no reason to deviate from the conclusions reached by the Fourth Circuit in *Perry*. The Brooke Amendment provided, at the time this suit was filed:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
>
> 1) 30 per centum of the family's monthly adjusted income;
>
> 2) 10 per centum of the family's monthly income; or
>
> 3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payment which is so designated.

42 U.S.C. § 1437a(a) (1983). This relevant portion of the Brooke Amendment sets a limit on rent chargeable to

tenants of low income housing. By definition, this rent includes utilities in an amount not to exceed that set by the Housing Authority, 24 C.F.R. §§ 860.403(a), 865.472 (1983), and approved by HUD. 24 C.F.R. § 865.473 (1983). The Brooke Amendment provisions apply only to lower income families who rent "dwelling units *assisted* under [the United States Housing] Act [of 1937]." 42 U.S.C. § 1437a(a) (1983) (emphasis added). Plaintiffs concede that the Housing Authority operates "its projects with federal subsidy pursuant to an Annual Contribution Contract" [5] from HUD, and that "HUD retains general enforcement authority." Plaintiffs' Brief in Support of Summary Judgment p. 3, 18. Thus, although low income families are certainly one of the beneficiaries of the Brooke Amendment, they are not the only beneficiaries. Consistent with the other provisions of the Housing Act, "the legislation had two beneficiaries—states as direct beneficiaries and low-income families as indirect beneficiaries." *Perry*, 664 F.2d at 1213.

Although finding that an implied right of action existed under the Brooke Amendment against HUD, the United States Court of Appeals for the Sixth Circuit, in *Howard v. Pierce*, 738 F.2d 722 (6th Cir. 1984), "could discern no justification for extending such a cause of action to a public housing agency . . . ." *Id.* at 730. In so holding, the Sixth Circuit, applying the second *Cort* factor, found that "nowhere in the legislative history . . . [was there] an expression of intent either to provide or deny a private means of enforcing the Brooke Amendment." *Id.* at 727. As the Fourth Circuit determined in *Perry*, "Con-

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[5] Annual Contributions Contract ("ACC")

A contract (in the form prescribed by HUD) for loans and annual contributions whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of a public housing project.

24 C.F.R. § 841.103 (1983).

gress need not fear that unless it specifically denies a cause of action, the courts will automatically imply one; when Congress is silent there is no presumption in favor of a legislatively created cause of action." *Perry*, 664 F.2d at 1213. Thus, under the *Cort* analysis, this court holds that there exists no implied right of action under the Brooke Amendment against a public housing authority such as RRHC.[6]

III.

CAUSE OF ACTION UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for the redress of deprivations of rights secured by the United States Constitution or statutes under color of state law. Though there is no constitutional right to the housing involved here and thus no constitutional violation, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), the Supreme Court has recognized that a § 1983 action may be based solely upon a violation of a federal statutory right. *Maine v. Thiboutot*, 448 U.S. 1 (1980). In order to prevail under a purely statutory-based § 1983 claim, however, the court must determine "[f]irst, whether Congress, in enacting the statute, manifested in the statute itself an intent to foreclose its private enforcement [and] [s]econd, whether the statute is of a kind aimed at creating enforceable 'rights' under § 1983." *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 820 (4th Cir. 1984); *Middlesex City Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1, 17, 20 (1981). Failing either of these, there can be no cause of action under § 1983. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at (1981).

An analysis of the language of the statute itself shows that there is no explicit denial of private enforcement; however, this court is of the opinion that Congress has

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[6] Other courts have reached a similar conclusion. See *Howard v. Pierce*, 738 F.2d 722 (6th Cir. 1984); *McGhee v. Housing Authority of City of Lanett*, 543 F.Supp. 607 (M.D. Ala. 1982); *Jackson v. Housing Authority of City of Fort Myers*, No. 82-136-CIV-A.N.-17 (M.D. Fla. April 4, 1984).

evinced, in the implementing regulations of the Brooke Amendment, an intent to foreclose private enforcement. The implementing regulations provide two means by which utilities may be provided: PHA-Furnished Utilities and Tenant Purchased Utilities.

> Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity), which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

24 C.F.R. § 865.470 (1983). These regulations provide for relief from excess charges of both PHA-Furnished and Tenant Purchased Utilities where a possible defect in the utility meter or error in the meter reading is involved, and in the case of PHA-Furnished utilities, if there is a defect in the dwelling. 24 C.F.R. § 865.481(a)(1), (a)(2) (1983). However, requests for relief from excess consumption on the grounds "that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage" are permitted "[i]n the case of Tenant-Purchased utilities only." 24 C.F.R. § 865.481(a)(3) (1983). Since the HUD regulations permit such requests for relief to be submitted to the PHA solely in the case of Tenant-Purchased Utilities, it is clear that such requests are foreclosed in a case such as this involving PHA-Furnished Utilities. Because Congress has "manifested an intent" to foreclose private enforcement, the plaintiffs have no enforceable rights within the meaning of section 1983 against a public housing authority such as RRHC.

Secondly, although the Brooke Amendment clearly manifests congressional intent to benefit generally tenants of public housing, its chosen means of accomplishing that

end is for HUD, rather than the tenants themselves, to enforce the statutory requirements. RRHA operates its projects with federal subsidies pursuant to an Annual Contributions Contract ["ACC"] "whereby HUD agrees to provide financial assistance and [RRHA] agrees to comply with HUD requirements for the development and operation of a public housing project." 24 C.F.R. § 841.103.[7] Plaintiffs allege that RRHA has failed to follow federal law prescribing how utility allowances are to be set and maintained. If RRHA has indeed breached any of the conditions of the Annual Contributions Contract, HUD has "the right . . . to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract § 508. "In sum, the whole of the legislative scheme . . . indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending 'to foreclose private enforcement' of the requirements of the Housing Act." *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 821 (4th Cir. 1984).

Even were the implementing regulations of the Brooke Amendment and the provisions of the ACC found not to foreclose private enforcement, the Fourth Circuit Court of Appeals has determined that in order for a violation of a federal statute to create "rights, privileges, or immunities" within the meaning of § 1983, it must at the least be of a kind that gives rise to an implied cause of action. In *Perry*, the court determined that the Housing Act did not create rights enforceable in private actions under § 1983. Although it could be argued that the

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[7] Section 5(1) of the Annual Contributions Contract between HUD and RRHA also provides that "[t]he Local Authority shall . . . operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the [United States Housing] Act [of 1937] . . . ." Section 311 allows HUD to inspect and to audit all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act.

provisions involved here are more specific than those in *Perry* and thus create such enforceable rights, this court must reject such a narrow interpretation of *Perry* in view of the fact that the Court of Appeals did not specifically limit its ruling to the provisions involved.[8] If there were any doubt as to the principle enunciated in *Perry*, it was dispelled by the holding in *Home Health* that "the conclusion that Home Health has no [implied] right of action . . . under 42 U.S.C. § 1395a *compels* the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." *Home Health*, 706 F.2d at 498. (emphasis added).

Because this court finds that the plaintiffs have failed to state a cause of action under 42 U.S.C. § 1983,[9] the defendant's Motion for Summary Judgment must be GRANTED. Each side shall bear its own taxable costs. An accompanying order shall be entered this day.

The Clerk of Court is directed to send certified copies of this opinion to counsel of record.

DATED: This 21st day of December 1984.

/s/ James C. Turk
Chief U.S. District Judge

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[8] In *Phelps*, the Fourth Circuit Court of Appeals also declined to limit its holding in *Perry*, when it stated that "[a]lthough it might be argued that *Perry* is distinguishable, since the preference and notice rights [here] are more specific . . . we are not persuaded that this distinction is of sufficient moment to alter our conclusion that the defendants' actions did not deprive the plaintiffs of any 'rights secured by the . . . laws of the United States.'"

[9] Since this court finds that the plaintiffs have failed to state a claim under § 1983, it is unnecessary to determine whether HUD is an indispensable party to the action. This court also dismisses the plaintiffs' cause of action based on the defendant's alleged breach of its lease agreements with the plaintiffs, under the doctrine of pendant jurisdiction as set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 82-0908

BRENDA E. WRIGHT, *et al.*, PLAINTIFFS

vs.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY, DEFENDANT

ORDER

By: James C. Turk, Chief District Judge

In accordance with the Court's Memorandum Opinion filed this day, it is hereby

ORDERED

that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED.

The Clerk of Court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21st day of December, 1984.

/s/ James C. Turk
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1068

BRENDA E. WRIGHT; GERALDINE H. BROUGHMAN; SYLVIA P. CARTER; individually and on behalf of all persons similarly situated, APPELLANTS

versus

CITY OF ROANOKE REDEVELOPMENT and HOUSING AUTHORITY, APPELLEE

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke
James C. Turk, Chief Judge—(CA 82-908)

Argued: June 6, 1985 Decided: August 26, 1985

Before WIDENER and MURNAGHAN, Circuit Judges, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

Tenants of public low-cost housing brought an action against their landlord, the Roanoke Redevelopment and Housing Authority ("RRHA"). Their complaint was based on the alleged deprivation of the tenants' rights under the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a),[1] and particular United States Housing and Urban Development ("HUD") regulations pertaining to utility allowances issued pursuant to that statute. Specifically, the tenant class alleged that the RRHA disregarded HUD regulations governing the establishment of "reasonable" electric utility allowances and the periodic revision of unreasonably low allowances. Thus, the tenants claimed that they were wrongfully overcharged for electrical consumption in excess of their designated allotments.[2]

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[1] § 1437a. Rental payments

(a) Families included; amount

Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o) of this title) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

[2] The appellants brought a second claim grounded on an alleged violation of a provision in the standard lease issued by RRHA. According to the tenants, RRHA's failure to furnish electrical

First, we must consider the correctness of the route which the plaintiffs sought to follow in their quest for injunctive and monetary relief,[3] namely, 42 U.S.C. 1983.[4]

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utilities service reasonably necessary for lighting and general household appliances at no charge violated its obligation to tenants under Paragraph 4 of their standard lease. Paragraph 4 of the standard lease provides:

> Utilities: Management Agent agrees to furnish at no charge to the Resident the following utilities as *reasonably necessary*: hot and cold water, gas for cooking, and *electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office.

(Emphasis added).

[3] The appellants initially sought injunctive relief requiring the RRHA to comply with the Brooke Amendment and federal regulations and a refund for all surcharges collected in violation of said law and regulations.

On appeal, however, the appellants stated that newly issued HUD regulations, 24 C.F.R. § 965.470-480 (1985) mooted their claim for injunctive relief and that only their claim for damages remained viable.

[4] § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

It is now widely recognized that 42 U.S.C. § 1983 may be invoked to redress certain violations of federal statutory law by state actors. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Not all violations of federal law, however, give rise to § 1983 actions. In order to determine whether a violation of a particular federal statute constitutes a basis for § 1983 liability, a court must make two inquiries: 1) whether Congress had foreclosed private enforcement of the pertinent statute in the enactment itself, *and* 2) whether the statute at issue was the kind that created enforceable "rights" under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981).[5]

We have recently ruled that violations of the Housing Act of 1937 do not give rise to a § 1983 cause of action. *See Perry v. Housing Authority of City of Charleston*, 664 F.2d 1210, 1217-1218 (1981); *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 820-822 (1984). In Perry, low income tenants brought an action for declaratory and injunctive relief and damages against the local housing authority. The tenants based their action on 42 U.S.C. § 1473[6] and on 42 U.S.C. § 1983. The

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[5] In other words, the right asserted must itself be created in such other federal statute, for 42 U.S.C. § 1983 provides only a remedy and does not itself create rights. *See, e.g., Miener v. State of Missouri*, 673 F.2d 969, 976 n.6 (8th Cir. 1982), *cert. denied*, 459 U.S. 909, 916 (1982) ("Section 1983 is remedial in nature, and does not itself provide for any rights, substantive or otherwise."); *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966) ("Sec. 1983 . . . should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right.").

[6] § 1437. Declaration of policy

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as

tenants claimed that the landlord failed to keep the premises safe and clean as required by 42 U.S.C. § 1437. We ruled that although the tenants were intended beneficiaries of the Act, the benefit was not without limits. It did not include the right to sue for what Congress had conferred. That is to say, there was no implied private right of action under § 1437. "[T]he legislative history indicates no intention to create in the Housing Act a federal remedy in favor of tenants but does indicate quite clearly the intention to place control of and responsibility for these housing projects in the local Housing Authorities." *Perry*, *supra*, at 1213. We also rejected the tenants' argument that they had a cause of action pursuant to 42 U.S.C. § 1983 since the tenants had failed to indicate "any substantive provisions of the various housing acts which [gave] them a tangible right, privilege, or immunity." *Id.* at 1217. While we acknowledged that "the Act was designed to help low income families" we emphasized that "the actual assistance went not to the tenants, but to the states." *Id.* We therefore concluded that § 1437 did "not create any legally cognizable rights in tenants of programs funded under the housing statutes." *Id.* We noted though that our disposition of the tenants' § 1437 and § 1983 claims did not deprive the tenants of a remedy. "The lease between the plaintiffs and [the local housing authority] creates a landlord-tenant relationship. Plaintiff's rights are based on this lease and their remedy, if any, lies in the [State] courts." *Id.* at 1217-1218, n.15.

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provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

In *Phelps*, tenants challenged the legality of the local housing authority's policies regarding the admission of new tenants. The tenants claimed that such policies deprived them of their "right" to be selected under the tenant preference provisions outlined in the Act and that therefore they had a cause of action pursuant to § 1983. In evaluating the viability of the § 1983 action in light of *Middlesex* and *Pennhurst*, *supra*, we first considered whether Congress foreclosed private enforcement of the Housing Act in the enactment itself. On that score, we concluded:

> [A]lthough [the statutory sections in question] clearly manifest Congressional intent to benefit generally applicants who are involuntarily displaced or who occupy substandard housing, its chosen means of accomplishing that end is plainly that *HUD, rather than private litigants, is to be the enforcer of the statutory directive.* Apart from the obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits, the statute is replete with indications of an intention to entrust HUD with the means and the responsibility for effective enforcement. The statutory scheme requires the Secretary to include in all Annual Contributions Contracts a requirement that public housing authorities adopt tenant selection criteria which include express preferences and a requirement that eligible applicants be notified of expected occupancy dates "insofar as . . . can be reasonably determined." Under the statute the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract. In sum, the whole of the legislative scheme, we think, indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights

under the ACC, thereby intending "to foreclose private enforcement" of the requirements of the Housing Act.

Phelps, supra, 742 F.2d at 821 (emphasis added). In sum, the situation is very analogous to the one in which a trustee, not the *cestui que trust*, must bring suit. *See, e.g., In Re Romano*, 426 F. Supp. 1123, 1128 (N.D. Ill. 1977), *modified*, 618 F.2d 109 (1980) ("trustee is the only party who can sue a tenant for back rent even if the beneficiary has the right to the land's proceeds").[7]

As to the second *Middlesex* inquiry, *i.e.*, whether the rights allegedly conferred by the preference and notice provisions were the kind of "rights" enforceable under § 1983, we concluded that no such "rights" were involved. *Phelps, supra*, 742 F.2d at 821-822. We ruled that it was highly unlikely that Congress intended federal courts to "make the necessary balancing of inevitably conflicting interests as between different applicants and possibly opposing statutory purposes that would be required to adjudicate individual claims of right." *Id.* at 822. Likewise, in the instant case, we consider it highly unlikely that

[7] It was not an act of caprice on the part of Congress to designate HUD the "enforcer" of the Housing Act. Rather, consolidating enforcement of the Act in a single governmental body was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

It should be noted that, in the instant case, the tenants stated at oral argument that they asked HUD to confront RRHA with its alleged violations of the Brooke Amendment. According to the tenants, HUD declined to intervene. HUD's decision presumably reflected an intricate economic "sifting and weighing" process in which it assessed the utility of proceeding further on the tenants' behalf. Since the tenants chose not to join HUD as a defendant, we need not look behind HUD's decision in order to determine whether it breached any duty—perhaps that of a "trustee" owed to low-cost housing tenants under the Act. *Cf. Howard v. Pierce*, 738 F.2d 722, 730 (6th Cir. 1984).

Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right.

To conclude, the plaintiffs under 42 U.S.C. § 1437(a) have certain rights but the remedy to enforce them is not conferred on them. Under 42 U.S.C. § 1983, conversely, the statute itself creates no right, but for rights elsewhere created of a certain character the statute provides a remedy. It will not suffice, however, simply to put the § 1437 right and the § 1983 remedy together to enable the case the plaintiffs assert to proceed. The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.[8]

[8] The tenants rely on *McGhee v. Housing Authority of City of Lanett*, 543 F. Supp. 607 (M.D. Ala. 1982) to support the proposition that a violation of the Brooke Amendment gives rise to a § 1983 cause of action. Such reliance is misplaced. In *McGhee*, a public housing tenant brought an action against public housing auth ities for setting rent in excess of ¼ of her income in violation of the Brooke Amendment. The tenant asserted a cause of action under both § 1437(a) and § 1983. The district court held that no private right of action existed under the Brooke Amendment but that the tenant had a cause of action under § 1983. The court's analysis pertaining to the existence of a § 1983 claim was, however, by no means exhaustive. The district court, in concluding that a § 1983 action existed, merely cited *Maine v. Thiboutot*, 448 U.S. 1 (1980), for the proposition that "§ 1983 encompasses claims based on purely statutory violations of federal law" without engaging in the more detailed inquiry prescribed in *Middlesex, supra*. Thus, based on the district court's reasoning, any time a plaintiff could assert a violation of federal law, (s)he could establish a § 1983 cause of action regardless of whether Congress foreclosed private enforcement of the particular statute or whether the statute at issue failed to create the type of "rights" enforceable under § 1983. *Maine v. Thiboutot*, however, concerned a *federally* established right to social security benefits which clearly was enforceable by

Thus, in light of *Perry* and *Phelps, supra*, the action of the district judge in granting summary judgment in favor of the RRHA on the § 1983 action and in dismissing the claim based on the lease without prejudice to pursuit by the plaintiffs of any state court cause of action which they may be entitled to assert is affirmed.[9]

AFFIRMED.

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private action in a state court. That, of course, is very different a) from Brooke Amendment benefits which, for reasons already advanced, are not enforceable by private action and b) from rights to bring state court actions under *state* landlord and tenant law.

As for *Beckham v. New York City Housing Authority*, 755 F.2d 1074 (2d Cir. 1985), it must yield to the authority of *Perry* and *Phelps, supra*, from our own circuit.

[9] We have also considered whether the statute relied on, namely, the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a), created rights of the type which plaintiffs here assert. *See Cort v. Ash*, 422 U.S. 66 (1975). The tenants in the instant case never asserted a cause of action under the Brooke Amendment but rather limited their claim to § 1983. However, given the close nexus between implying a cause of action under a federal statute and asserting a § 1983 claim, we address the former in order to render our disposition of the case more "complete." *See Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 822, n.10 (4th Cir. 1984):

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(e)(4)(A) and 42 U.S.C. § 1437d(e)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a separate private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. *The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete*, we reject plaintiffs' implied private cause of action argument on the reasoning of *Perry v. Housing Authority*, 664 F.2d 1210 (4th Cir. 1981).

(Emphasis added).

Review of the statutory language of the Brooke Amendment reveals no provisions creating a right on the part of individual tenants to assert infractions of the sort claimed here. The existence of such a right is essentially negatived by the provisions of the annual contributions contract, a standardized form employed by HUD in this case. By Section 508 the annual contributions contract provides that HUD has "the right . . . to maintain any and all actions at law or in equity against the local authority to enforce the correction of any . . . default or to enjoin any . . . default or breach." The implication to be drawn from that language runs counter to the claim that the plaintiffs have enforceable rights under the Brooke Amendment.

GORDON, Senior District Judge, Concurring:

I concur in the analysis and the result of the panel's opinion. I write this brief concurrence to emphasize and, I hope, to clarify a point upon which the precedent has become a bit unclear, and which I found troubling. In considering the briefs, oral arguments, and the district court's decision in this case, it became apparent that the proper § 1983 analysis has become mistakenly entangled with the analysis for an implied private right of action. While the two analyses are closely related, they are separate and distinct. My purpose is to disentangle them.

As discussed in the panel's opinion, *Perry v. Housing Authority of Charleston*, 664 F.2d 1210 (4th Cir. 1981), and *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816 (4th Cir. 1984), are the controlling precedent on the issues presented in this case, that is, whether a § 1983 cause of action exists to enforce the Brooke Amendment to the Housing Act of 1937. In each case, this court applied the standards set forth in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex City Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), for determining whether § 1983 enforcement of a statutory violation was proper. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). The dual tests for § 1983 enforcement are 1) whether Congress, in enacting the statute and its enforcement scheme, had foreclosed a private remedy, and 2) whether the statute created enforceable "rights, privileges, or immunities" under § 1983. *Middlesex*, 453 U.S. at 19; *Pennhurst*, 451 U.S. at 28, n. 21.

In *Perry* the aggrieved tenants sought relief under § 1983 and also alleged a private right of action under the Housing Act of 1937 (Act). The *Perry* court began its analysis by determining whether the tenants had a private right of action under the Act. To do this, the court applied the test of *Cort v. Ash*, 422 U.S. 66 (1975):

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . and [fourth], is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

Perry, 664 F.2d at 1211-12 (*quoting Cort v. Ash*, 422 U.S. at 78).

It is clear that many of the elements that a court must consider in applying *Cort v. Ash* would also be relevant in determining whether a 1983 action was proper under *Middlesex* and *Pennhurst*. Both tests hinge on whether "rights" were created in the prospective plaintiffs and whether Congress intended private enforcement by the respective procedure. Distinctions exist, though, however fine. For instance, *Cort v. Ash* instructs us to consider whether there is "any indication of legislative intent . . . either to create [a private] remedy or to deny one," and to ask whether it would be consistent with the underlying purpose to imply one, 422 U.S. at 78; *Middlesex* commands that we ask "whether Congress had foreclosed private enforcement of that statute in the enactment itself." 453 U.S. at 19. Under the former, we must find an intention to imply a remedy before granting one; under the latter, if there is a "right," we assume that private enforcement is permissible absent some clear indication to the contrary. While in many instances this would be a distinction without a difference, it did not prevent the Supreme Court in *Middlesex* from addressing the questions separately.[1]

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[1] The Court was faced with whether a private right of action existed to enforce certain federal pollution control and environ-

The *Perry* court first addressed whether the tenants could pursue a private right of action under the Act, and applied *Cort v. Ash*. Because the sections of the Act relied on by the plaintiffs in *Perry* were merely broad policy provisions, and because HUD was the intended enforcer of the Act, the court concluded that there were no "rights" created and no intent to imply a private remedy. The court therefore refused to imply a private right of action. Turning to whether the tenants could sue under § 1983, the *Perry* court focused on the second prong of the *Middlesex* test: whether the statute created privately enforceable "rights." Based partly on the same factors the court had considered in its *Cort v. Ash* discussion, the *Perry* court concluded that the Act "does not create any legally cognizable rights in tenants of programs funded under the housing statutes." 664 F.2d at 1217. Because it had answered this inquiry in the negative, the court never reached the issue of legislative intent to foreclose § 1983 enforcement.

Subsequently, in *Home Health Services v. Currie*, 706 F.2d 497 (4th Cir. 1983) (per curiam), this court was faced with a claim alleging a private right of action under the Medicare Act. The court applied *Cort v. Ash* and concluded that no such private right of enforcement existed. The court noted that, although a § 1983 claim had not been raised at trial, one had been argued on appeal. Assuming, *arguendo*, that the issue was properly before it, the court stated that "the conclusion that Home Health has no right of action [under this statute]

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mental protection acts. The Court stated that "both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied." 453 U.S. at 18 (applying *Cort v. Ash*). The Court then applied the test for § 1983 and, based on these same factors, concluded that "the existence of . . . express remedies [in the statutes] demonstrate not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

compels the conclusion that Home Health likewise has no cause of action under § 1983. . . ." *Id.* at 498 (*citing Perry*, 664 F.2d at 1217-18). Read in context, this language means "as in *Perry*, we find that based upon the same elements which lead us to conclude that no private right of action exists under *Cort v. Ash*, we conclude that there is no § 1983 right under *Middlesex*." Taken out of context, however, it could imply, incorrectly, that application of the *Cort v. Ash* test suffices to answer the § 1983 inquiry as well, *i.e.*, that the conclusion that there is no private right of action leads inexorably to dismissing a § 1983 action.

The potential for misinterpreting this language may have been foreshadowed in *Phelps v. Housing Authority*, 742 F.2d 816 (4th Cir. 1984). In *Phelps*, as in *Perry*, the plaintiffs attempted to sue under the broad policy provisions of the Housing Act, but, unlike the *Perry* plaintiffs, the tenants urged their claim solely under § 1983. Applying *Pennhurst*, *Middlesex*, and *Perry*, the court in *Phelps* concluded that a § 1983 action was not proper. In a footnote, the court noted:

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(c)(4)(A) and 42 U.S.C. § 1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the *district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality that in essence it gives rise to such an implied action*, or whether they suggest that they had asserted such a private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. *The inquiry under either interpretation of the appellant's position is similar, if not perfectly congruent.* Nevertheless, lest our

> disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of [*Perry*].

742 F.2d at 822, n. 10 (emphasis added).

The subject case was brought exclusively under § 1983. In its Memorandum Opinion, the district court quoted from *Home Health* the dictum that "the conclusion that Home Health has no right of action . . . under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under § 1983. . . ." Thus, the district court concluded that "a determination of whether the plaintiffs have been deprived of 'rights, privileges, or immunities' within the meaning of § 1983 should begin with a determination of whether an implied right of action exists under the Brooke Amendment." *Wright v. City of Roanoke Redevelopment and Housing Authority*, No. 82-0908, Slip Op. at 3 (W.D.W.Va. Dec. 21, 1984). The court proceeded to apply *Cort v. Ash*, and found no private right of action. The district court then discussed *Middlesex*, but in the final analysis, the court decided that plaintiffs could not bring their action under § 1983 based on its conclusion that no private right of action existed, plus the "compels" language of *Home Health*. Slip Op. at 11. This seems to represent a misinterpretation of *Home Health* and a confusion of the appropriate analysis for these two distinct remedial devices.

It is clear from *Perry*, *Phelps*, and from this court's opinion today that the correct inquiry to determine whether a § 1983 action is proper is set forth in *Pennhurst* and *Middlesex*. While any confusion is understandable, it was unnecessary and inappropriate to consider *Cort v. Ash* and its progeny in the subject case. Although the § 1983 analysis closely parallels the *Cort v. Ash* inquiry for implied private rights of action, the two are distinct, however subtly. It is only to emphasize this distinction that I felt compelled to add my voice to the opinion of this court, for I concur fully in its opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

(Attachment to Affidavit of Herbert D. McBride, dated November 16, 1984)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT LOW RENT PUBLIC HOUSING CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT

• • • •

Sec. 5. *Covenant to Develop and Operate*

(1) The Local Authority shall develop each Project being or to be developed and shall operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the Act and applicable provisions of state and local law.

• • • •

Sec. 311. *Access to Records and Projects; Audits*

(A) The Government and the Comptroller General of the United States, or his duly authorized representatives, shall have full and free access to the Projects and to all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act, including the right to audit, and to make excerpts and transcripts from such books and records.

• • • •

Sec. 507. *Definition of Substantial Breach*

(8) If there is any default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract other than the defaults or breaches enumerated in Sec. 506 or in subsections (1) through (7) of this Sec. 507; and if such default or breach has not been remedied within thirty days or such longer period as may be set by the Government) after the Government has notified the Local Authority thereof.

• • • •

Sec. 508. *Other Defaults or Breaches, and Other Remedies*

(B) If the Local Authority shall at any time be in default or breach, or take any action which will result in a default or breach, in the performance or observance of any of the terms, covenants, and conditions of this Contract, then the Government shall have, to the fullest extent permitted by law (and the Local Authority hereby confers upon the Government the right to all remedies both at law and in equity which it is by law authorized to so confer) the right (in addition to any rights or remedies in this Contract specifically provided) to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or breach or to enjoin any such default or breach.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 85-5915

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN and SULVAI P. CARTER, PETITIONERS

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

ON PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 21, 1986